Supreme Court, U.S.
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No.

Supreme Court of the United States

ISRAEL RODRIGUEZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Mr. Rodriguez' sentence for marijuana was imposed and enhanced under mandatory guidelines, and in excess of the statutory maximum of 21 U.S.C. § 960(b)(4), in spite of the facts that neither drug quantity nor "role in the offense" was presented to the jury or found beyond a reasonable doubt, and a reasonable jury could have found a quantity less than the statutory maximum of 21 U.S.C. § 960(b)(4) and no enhancement for role in the offense. His direct appeal was denied 6-16-06, a few days before this Court handed down *Apprendi v. New Jersey*, 120 S. Ct. 2348 (6-26-00). Counsel failed to file a petition for rehearing, a motion to stay the mandate, or a timely petition for Writ of Certiorari. When Mr. Rodriguez filed a pro se out of time petition for Writ of Certiorari, the government conceded his case should be remanded for reconsideration in light of *Apprendi* if the Court found the petition timely. The Court denied the petition whereupon Mr. Rodriguez filed a motion pursuant to 28 U.S.C. § 2255 in the District Court alleging ineffective assistance of counsel in failing to file a petition for rehearing or a motion to stay the mandate arguing the *Apprendi* violation. Where the lower courts denied the motion and denied Certificate of Appealability,

1.) Was counsel's failure to timely file a petition for rehearing or motion to stay the mandate due to the obvious *Apprendi* violation at sentencing not only professionally unreasonable, viewed as of the time of counsel's conduct and prejudicial to Mr. Rodriguez under both the law at the time of the appeal and also viewed with the "hindsight" of *Booker*?

2.) Do the retroactivity principles of *Teague v. Lane* violate the "hindsight" application of clarified law under *Lockhart v. Fretwell*?

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the First Circuit.

More specifically, the Petitioner Israel Rodriguez and the Respondent United States of America are the only parties. Neither party is a company, corporation, or subsidiary of any company or corporation.

TABLE OF CONTENTS

	Page:
Questions Presented	i
List of Parties to the Proceedings in the Courts Below	ii
Table of Contents	iii
Table of Authorities	v
Petition for a Writ of Certiorari	1
Opinions Below	1
Statement of Jurisdiction	2
Constitutional Provisions, Treaties, Statutes, Rules, and Regulations Involved	2
Statement of the Case	3
Reasons for Granting the Writ	18
1.) THIS COURT SHOULD GRANT MR. RODRIGUEZ' PETITION FOR WRIT OF CERTIORARI BECAUSE THE COURT OF APPEALS FOR THE FIRST CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION	18
1A.) Counsel's Failure To Timely File A Petition For Rehearing Or Motion To Stay The Mandate Due To The Obvious *Apprendi* Violation At Sentencing Was Not Only Professionally Unreasonable, Viewed As Of The Time Of Counsel's Conduct, But Prejudiced Mr. Rodriguez Under Both The Law At	

The Time Of The Appeal And Also Viewed With The "Hindsight" Of *Booker* **20**

1B.) This Court Should Grant Certiorari To Clarify The Relationship Between The "Hindsight" Application Of Clarified Law Under *Lockhart v. Fretwell* And The Retroactivity Principles Of *Teague v. Lane* **25**

1C.) It Is Uncontested That There Were Substantive Violations Of *Apprendi*, *Blakely*, And *Booker* In Mr. Rodriguez' Case **27**

Conclusion 28

Appendix 29

USCA Opinion Dated 1-12-06 ..... A

USDC Judgment & Commitment Order Entered 12-4-98 ..... B

USCA Opinion Dated 6-16-00 C

USDC Denial of Section 2255 Motion Dated 9-28-04 ..... D

USDC Denial of Request for Certificate of Appealability Dated 1-26-05 ..... E

Supreme Court Denial of Certiorari Dated 4-23-01 ..... F

Government Brief in Opposition to Petition for Writ of Certiorari, Case #00-8158 ..... G

TABLE OF AUTHORITIES

Page:

Cases

Apprendi v. New Jersey,
530 U.S. __, 147 L. Ed. 2d 435,
120 S. Ct. 2348; 2000 U.S. LEXIS 4304
(6-26-00).....*passim*
Ballard v. United States,
400 F.3d 404; 2005 U.S. App. LEXIS 4002
(6th Cir. 2005).....*22-24,26*
Benanti v. United States,
355 U.S. 96 (1957).....*19*
Blakely v. Washington,
124 S. Ct. 2531; 159 L. Ed. 2d 403;
2004 U.S. LEXIS 4573 (6-24-04).....*27*
Carless Jones v. United States,
194 F.3d 1178; 1999 U.S. App. LEXIS 29751
(10th Cir. 2000).....*20*
Carless Jones v. United States,
2000 U.S. LEXIS 4518 (6-29-00).....*20*
Elkins v. United States,
364 U.S. 206 (1960).....*19*
Everett v. Beard,
290 F.3d 500; 2002 U.S. App. LEXIS 8733
(3rd Cir. 2002).....*24, 25,26*
GACA v. United States,
411 U.S. 618 (1973).....*19*
Hicks v. United States,
2005 U.S. App. LEXIS 2962 (6th Cir. 2-18-05).....*22*
Kapral v. United States,
166 F.3d 565 (3rd Cir. 1999).....*13*
Kimmelman v. Morrison,
477 U.S. 365, 91 L.Ed.2d 305,
106 S.Ct. 2574 (1986).....*22*

Lawrence v. Chater,
516 U.S. 163, 167-68, 133 L. Ed. 2d 545,
116 S. Ct. 604 (1996) *28*
Lewis v. Dretke,
355 F.3d 364; 2003 U.S. App. LEXIS 26156
(5th Cir. 2003) *23, 25,26*
Lockhart v. Fretwell,
506 U.S. 364, 373-375, 122 L.Ed.2d 180,
113 S.Ct. 838 (1993) ..... *passim*
Mayo v. Henderson,
13 F.3d 528 (2nd Cir. 1994) *23, 24,26*
McKee v. United States,
167 F.3d 103; 1999 U.S. App. LEXIS 1390
(2nd Cir. 1999) *24, 25,26*
McNabb v. United States,
318 U.S. 332 (1943) *19*
Prou v. United States,
199 F.3d 37; 1999 U.S. App. LEXIS 32827
(1st Cir. 1999) *24, 25,26*
Rea v. United States,
350 U.S. 214 (1956) *19*
Ross v. Artuz,
150 F.3d 97, 98 (2nd Cir. 1998) *14*
Strickland v. Washington,
466 U.S. 668, 80 L.Ed.2d 674,
104 S.Ct. 2052 (1984) *22*
United States v. Behrens,
375 U.S. 162 (1963) *19*
United States v. Burch,
202 F.3d 1274; 2000 U.S. App. LEXIS 1211
(10th Cir. 2000) *14*
United States v. Cuch,
79 F.3d 987, 991 [n. 9] (10th Cir. 1996) *14*
United States v. Garcia,
210 F.3d 1058; 2000 U.S. App. LEXIS 8581
(9th Cir. 2000) *14*

United States v. Gholson,
2003 U.S. Dist. LEXIS 10914 (ND IL 6-26-03).....22
United States v. Greer,
285 F.3d 158; 2000 U.S. App. LEXIS 38679
(2nd Cir. 8-14-00) 21
United States v. Hollis,
191 F. Supp. 2d 1257;
2002 U.S. Dist. LEXIS 5640 (D KS 2002).....22
United States v. Jacobs,
429 U.S. 909 (1976).....19
United States v. Lacey,
162 F.3d 1175 (10th Cir. 1998).....14
United States v. Meshack,
225 F.3d 556; 2000 U.S. App. LEXIS 21955
(5th Cir. 8-28-00).....21, 22
United States v. Mojica-Baez,
229 F.3d 292; 2000 U.S. App. LEXIS 22232
(1st Cir. 8-30-00) 21
United States v. Murray,
2001 U.S. App. LEXIS 443 (6th Cir. 1-9-01).....10
United States v. Nordby,
225 F.3d 1053; 2000 U.S. App. LEXIS 22776
(9th Cir. 9-11-00) 21
United States v. Rehmann,
226 F.3d 521; 2000 U.S. App. LEXIS 21756
(6th Cir. 8-28-00).....21
United States v. United States v. Gamble,
208 F.3d 536, 2000 U.S. App. LEXIS 6905
(5th Cir. 2000).....14
United States v. Westmoreland,
2001 U.S. App. LEXIS 2295 (7th Cir. 2-15-01).....8
United States v. Wilson,
2000 U.S. App. LEXIS 21416 (10th Cir. 8-23-00)..21, 22

Statutes

18 U.S.C. § 3583(b)(1).....7
18 U.S.C. § 3583(b)(2).....7
21 U.S.C. § 960(b)(3).....7

21 U.S.C. § 960(b)(4).....*i, 7*
21 U.S.C. § 963.....*ii, 3*
28 U.S.C. § 1254(1).....*2*

Other Authorities

U.S.C.A. Fifth Amendment.....*2*
U.S.C.A. Sixth Amendment.....*2, 22, 27*

Rules

Fed. R. Crim. P. 52.....*21, 22*
Supreme Court Rule 10.....*18, 19*

PETITION FOR A WRIT OF CERTIORARI

Israel Rodriguez, the Petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above entitled case on 1-12-06.

OPINIONS BELOW

The 1-12-06 opinion of the Court of Appeals for the First Circuit, whose judgment is herein sought to be reviewed, is an unpublished decision, and is reprinted in the separate Appendix A to this Petition.

The prior opinion and judgment (Judgment & Commitment Order) of the United States District Court for the District Of Puerto Rico, entered on 12-4-98, is an unpublished decision, and is reprinted in the separate Appendix B to this Petition.

The prior opinion and judgment of the United States Court of Appeals for the First Circuit in the direct appeal in this case, entered on 6-16-00, is is reported at 215 F.3d 110; 2000 U.S. App. LEXIS 14141 and is reprinted in the separate Appendix C to this Petition.

The prior opinion and judgment of the United States District Court for the District Of Puerto Rico, denying Mr. Rodriguez' motion pursuant to 28 U.S.C. § 2255, entered on 9-28-04, is an unpublished decision, and is reprinted in the separate Appendix D to this Petition.

The prior opinion and judgment of the United States District Court for the District Of Puerto Rico, denying Mr. Rodriguez' Request for Certificate of Appealability, entered on 1-26-05, is an unpublished decision, and is reprinted in the separate Appendix E to this Petition.

The prior judgment of the Supreme Court of the United States denying an out of time petition for Writ of Certiorari on direct appeal, is reported at 532 U.S. 996; 121 S. Ct. 1658; 149 L. Ed. 2d 640; 2001 U.S. LEXIS 3266 and is reprinted in the separate Appendix F to this Petition.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on 1-12-06. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury... nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law ... *Id.*

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. *Id.*

STATEMENT OF THE CASE

On or about 7-30-97 Israel Rodriguez was charged with violation of 21 U.S.C. § 963 (conspiracy to import in excess of 5,000 pounds of marijuana) (Count 1); 21 U.S.C. § 963 and 18 U.S.C. § 2 (Aiding & Abetting attempt to import in excess of 5,000 pounds of marijuana) (Count 2).

Mr. Rodriguez proceeded to trial.

On 5-15-98, Mr. Rodriguez was found guilty by the jury.

On 11-20-98, Mr. Rodriguez was sentenced under mandatory guidelines to 188 months incarceration for violations of 21 U.S.C. § 963 (conspiracy to import in excess of 5,000 pounds of marijuana) (Count 1); 21 U.S.C. § 963 and 18 U.S.C. § 2 (Aiding & Abetting attempt to import in excess of 5,000 pounds of marijuana) (Count 2). This sentence represented relevant conduct involving 5,000 pounds of marijuana never found by a jury and also included enhancement from a Total Offense Level of 32 to a Total Offense Level of 36 under the mandatory guidelines based on the judge found 'fact' that he "was the organizer of the criminal activity which involved five or more participants". (Transcript of Sentencing 11-20-98, page 24) (Appendix B)

The judgment was entered on 12-4-98.

Counsel filed a direct appeal. On direct appeal, counsel challenged the sufficiency of the evidence. They also argued that the jury could not have found beyond a reasonable doubt that a marijuana shipment intercepted by the Coast Guard off the coast of Colombia was the shipment that petitioner intended to bring to Puerto Rico and that the government's failure to prove that fact constituted an improper constructive amendment to the indictment. Counsel further argued that the district court erred in admitting testimony about their "other crimes" and contended that during closing argument the prosecutor had improperly referred to defendants' failure to testify. Finally, counsel